Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment:	)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost	)	
of Broadband Deployment by Improving	)	
Policies Regarding Public Rights of Way and	)	
Wireless Facilities Siting	)	

REPLY COMMENTS OF THE

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SUMMARY

Parties to this proceeding have identified important concerns impeding access to rights of way and the rapid and efficient deployment of broadband nationwide. ACA members share these concerns and discuss herein specific barriers they face, which either prevent deployments or significantly increase their costs. Given ACA's concerns, as well as the identified concerns in the National Broadband Plan, the Notice of Inquiry and the comments of the parties, the Commission should initiate immediately a rulemaking to address these impediments. As Chairman Genachowski stated in a speech earlier this week:

> Government has a limited but essential role to play to facilitate private investment and innovation, and ensure that infrastructure gaps are addressed. Government must efficiently utilize assets it controls or manages, like spectrum and rights-of-way. It must ensure that the programs it manages are fiscally responsible and meet the challenges of today, not the past.[1]

ACA members are mid-size and small facilities-based providers of voice, video and Internet access services that generally compete with larger providers and often provide broadband service to less populated communities. They hold cable or telecommunications franchises in states and localities that give them access to public rights of way to provide communications services in exchange for a franchise fee. In response to the Commission's Notice of Inquiry, ACA conducted a survey of its members to identify the specific impediments they face to deploying broadband to new communities and providing competitive broadband alternatives for American consumers. ACA members submitted an overwhelming number of responses, each showing great concern with these impediments. Barriers to building broadband networks go to the heart of their businesses, and, unfortunately, they confront too many of them

[1] FCC Chairman Julius Genachowski, "Jobs and the Broadband Economy," LivingSocial, Washington, DC at 6 (Sept. 27, 2011), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0927/DOC-309898A1.doc.

too often. Moreover, when taken in aggregate, their problems become a public interest concern. If they cannot access rights of way efficiently and cost-effectively, the U.S. will lag in the universal deployment of high performance broadband networks.

ACA members have identified many restrictions, delays, excessive fees and competitively discriminatory policies imposed by private and public entities when seeking to extend service to new communities. ACA discusses herein a sample of its members' experiences with public and private entities that control rights of way, facilities or crossings that can impede the deployment of broadband. ACA members are particularly vulnerable to unfair, unreasonable and discriminatory treatment by such "gatekeepers" because they are generally smaller companies without access to armies of attorneys and consultants to assist in their navigation of the "patchwork of requirements" necessary to install high-speed broadband lines. ACA members are more reliant on government agencies and private gatekeepers for assistance and fair and reasonable treatment than their larger competitors. In sum, they face real problems the Commission needs to address.

In addition, ACA supports the comments of other parties, such as Level 3 and Verizon, demonstrating that state and local statutes and regulations often operate to impede access to rights of way to provide communications services. ACA agrees that the Commission can and should take this opportunity to rationalize and standardize the interpretation of Section 253 of the Communications Act.

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REPLY COMMENTS OF THE AMERICAN CABLE ASSOCIATION

The American Cable Association ("ACA"), by its attorneys, respectfully submits these reply comments in response to the Commission's Notice of Inquiry in the above captioned proceeding.[2] ACA supports the comments of other parties, such as Level 3 and Verizon, that have demonstrated that state and local statutes and regulations often operate to impede communications service providers' access to rights of way. ACA members have experienced, and continue to experience, significant problems accessing rights of way and similar impediments in their efforts to expand their networks to deliver broadband and other services. When taken in aggregate, these problems undermine the Commission's efforts to achieve universal broadband service. As Chairman Genachowski stated in a speech earlier this week:

> Government has a limited but essential role to play to facilitate private investment and innovation, and ensure that infrastructure gaps are addressed. Government must efficiently utilize assets it controls or manages, like spectrum and rights-of-way. It must ensure that the programs it manages are fiscally responsible and meet the challenges of today, not the past.[3]

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2 *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Notice of Inquiry, FCC 11-51 (rel. Apr. 7, 2011) ("Notice").

3 FCC Chairman Julius Genachowski, "Jobs and the Broadband Economy," LivingSocial, Washington, DC at 6 (Sept. 27, 2011), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0927/DOC-309898A1.doc.

ACA members are mid-size and small providers of voice, video and Internet access service that generally compete with larger providers and often provide broadband service to less populated communities.[4] They hold cable franchises and telecommunications franchise rights in states and localities that give them access to certain rights of way to provide communications services in exchange for a franchise fee. ACA members, however, face a myriad of restrictions, delays, excessive fees and competitively discriminatory treatment imposed by private and public entities when seeking to extend service to new communities and run backhaul to a central office. The Commission should initiate a rulemaking to address these impediments to, and costs of, deploying broadband throughout the country.

Further, ACA agrees with many commenters that the Commission should address state and local statutes and regulations that limit the ability of potential competitors to compete in a fair and balanced legal and regulatory environment. In addition, the Commission's rules should invalidate state and local rights of way management requirements and fees that are not fair and reasonable, and competitively neutral and nondiscriminatory.

I. ACA MEMBERS FACE PUBLIC RIGHTS OF WAY IMPEDIMENTS TO DEPLOY BROADBAND IN NEW COMMUNITIES OR ON A COMPETITIVE BASIS

The Commission's Notice seeks to update its "understanding of current rights of way and wireless facilities siting policies" and "assess the extent and impact of challenges related to these matters…."[5] The Commission recognizes the "patchwork of requirements"[6] imposed by "a number of different government entities, including cities, towns, counties, states,

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4 ACA has approximately 900 members serving approximately 7.6 million video subscribers across 49 states.

5 Notice, ¶ 9.

6 *Id*., ¶ 4.

and a number of federal government entities" as well as "railroads, utilities, and other private entities…."[7] Based on the Commission's Notice, ACA conducted a survey of its members to determine what impediments they face to deploying broadband to new communities and competitive broadband alternatives for American consumers. ACA received responses from a large proportion of its membership base highlighting intense concerns regarding their ability to access rights of way to efficiently and cost-effectively deploy broadband throughout the United States.

As discussed below, although ACA supports the position of several parties that the Commission should address state and local statutes and regulations that have the effect of prohibiting an entity's ability to provide telecommunications service,[8] ACA discusses herein a sample of its members' experiences with other public and private entities that control rights of way, facilities or crossings that can impede the deployment of broadband. ACA members are particularly vulnerable to unfair, unreasonable and discriminatory treatment by such "gatekeepers" because they are generally smaller companies without access to armies of attorneys and consultants to assist in their navigation of the "patchwork of requirements" necessary to install high-speed broadband lines. ACA members are more reliant than their larger competitors on government agencies and private gatekeepers for assistance and for fair and reasonable treatment.

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7 *Id.*, note 5.

8 *See e.g.*, Comments of Level 3 Communications, LLC, WC Docket No. 11-59 (filed July 18, 2011) ("Level 3 Comments"); Comments of Verizon and Verizon Wireless, WC Docket No. 11-59 (filed July 18, 2011) ("Verizon Comments").

A. ACA MEMBERS FACE EFFECTIVE RESTRICTIONS ON THE DEPLOYMENT OF BROADBAND

Although excessive fees and unreasonable requirements can make accessing rights of way exceedingly difficult, and can effectively prohibit a broadband provider from accessing rights of way, often a provider is simple not permitted access. ACA members, for instance, have been effectively restricted from using rights of way to provide high-speed broadband to new customers by the policies of state departments of transportation with respect to state highways. As an example, ACA member WOW! is unable to access the right of way along US Highway 41 in Indiana to run fiber lines to 1,900 potential customers in the rural communities of Haubstadt and Fort Branch by the Indiana Department of Transportation ("INDOT").[9] This is because, pursuant to the INDOT Utility Accommodation Policy, longitudinal installations on highways with full access control (*e.g.*, interstate highways or divided highways) are not permitted.[10] Therefore, WOW! cannot bury communications lines in the rights of way parallel to such highways. The only way around this policy is to obtain an exception, but from WOW!'s experience, that takes a very long time to obtain and requires a demonstration of extreme hardship, such as the forced relocation of existing facilities.[11] Therefore, WOW is highly unlikely to receive an exception for a longitudinal installation along the limited access portion of US Highway 41 from INDOT.[12] Further, the uncertainty makes

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9 *See* Declaration of Mark Deckard at 2, included as Exhibit 1. INDOT has jurisdiction over US Highway 41 in Indiana. *See id*.

10 *See* INDOT Utility Accommodation Policy, Section 10-3.03(06)-8 *available at* http://www.in.gov/indot/div/public/utilities/pubs/UtilityAccommodationPolicy.pdf and Declaration of Mark Deckard at 2.

11 *See* Declaration of Mark Deckard at 2.

12 *See id*. at 2-3.

obtaining project funding exceedingly difficult.[13] WOW! is effectively restricted from utilizing the rights of way along the limited access portions of US Highway 41 in Indiana in order to deploy broadband.

The alternative of obtaining private easements to install its lines is a prohibitively expensive endeavor that could be derailed by a single landowner.[14] Ultimately, INDOT's restriction regarding interstate and divided highways has resulted in WOW!'s inability to economically serve the residents of Haubstadt and Fort Branch with high-speed Internet.[15]

WOW!'s problem is shared by other ACA members. In Kansas Eagle Communications Inc. ("Eagle") has been effectively restricted from using rights of way along state highways by arbitrary Kansas Department of Transportation ("KDOT") policies.[16] KDOT permits users of rights of way along state highways to access only the outside seven feet of the right of way furthest from the centerline.[17] Where rights of way are very narrow relative to the paved surface, KDOT will understandably not allow right of way access even to the outside seven feet because there is not enough space to do so without impacting KDOT's ability to maintain the roadway.[18] However, KDOT does not correspondingly allow access to other than the outer seven feet in areas where the right of way is wider.[19]

According to Eagle, restricting access to only the outer seven feet of the right of way effectively means that only two utility lines will be permitted regardless of the width of the

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13 *See id*. at 3.

14 *See* Declaration of Mark Deckard at 1-2. Generally, WOW!'s experience is that private easements cost $3.00 - $5.00 per linear foot, but landowners are not compelled to accept an offer. *See id*.

15 *See id.* at 2-3.

16 *See* Declaration of Gary Shorman included as Exhibit 2.

17 *See id.* at 4-5.

18 *See id*. at 5.

19 *See id*.

right of way or the road.[20] After two lines are installed, all other competitors are denied access to the right of way.[21] In practice, this generally means that the incumbent cable and/or broadband provider is allowed to access the right of way and competitors such as Eagle are denied, even where the highway is wide enough for additional competitor lines.[22]

Eagle understands the need for KDOT to maintain the state highway. However, KDOT's policy appears to be arbitrary or at least unreasonable. How can legitimate safety and highway maintenance concerns result in not allowing access to even the outside seven feet of the right of way when the right of way is narrow, but also not allowing access to more than the outside seven feet of the roadway where the right of way is wider? There should be a correspondence between the width of the right of way and the number of utility lines that can be accommodated. In order to compete in such situations, Eagle has been forced to obtain private easements, which tend to cost more and put it at a competitive disadvantage.[23]

B. MANY GATEKEEPERS IMPOSE PROCESSING DELAYS ON THE DEPLOYMENT OF BROADBAND SERVICES

The Commission's Notice requests information regarding the timeliness and ease of the right of way and similar access permitting processes, including whether application processes are clear.[24] ACA members often face delays imposed by public and private gatekeepers when trying to access rights of way or facilities to deploy broadband, which can result in effectively prohibiting their ability to provide high-speed Internet services. In addition, ACA members have confronted unclear and often changing application requirements.

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20 *See id.*

21 *See id.*

22 *See* Declaration of Gary Shorman at 5.

23 *See id.*

24 *See* Notice, ¶ 13.

For example, Eagle has been delayed in deploying broadband service due to the unchecked discretion held by railroads. In 2009, it filed an application with Union Pacific to cross under a single section of rail.[25] The application documents stated that the application would be acted on within forty-five days.[26] For no apparent reason, the approval took twice that long.[27] In addition, Union Pacific's operative application requirements are unclear.[28] The Union Pacific application materials stated that Eagle was required to bore down twelve feet to bury cable under a rail line, but a railroad representative later required fifteen foot depth.[29] Although in that case the change did not cause a delay, broadband providers face the uncertainty and risk that a railroad can change a policy without notice, including after the work is done, which would result in substantial delays.[30] Further, such changes make knowing, and planning for, the operative requirements difficult. There is no obligation that the railroad follow its own requirements, including with respect to the timing of application review and decision-making.[31] A broadband provider has no recourse to challenge railroad delays or terms or conditions that it believes are unnecessary or inconsistent.[32]

Further, Eagle faced a similar delay imposed by the U.S. Army Corps of Engineers to access rights of way under its jurisdiction. Eagle attended a pre-application meeting and submitted an application to access two miles of road controlled by the Corps as part

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25 *See* Declaration of Gary Shorman at 2.

26 *See id.* at 2.

27 *See id.*

28 *See* Notice, ¶ 14.

29 *See id.*

30 *See id.*

31 *See* Declaration of Gary Shorman at 2.

32 *See id.*

of a project to run fiber optic cable for broadband services in Clay County, Kansas.[33] Although the project was small and not complicated, and the Corps conducted no studies and engaged in no engineering work, Eagle did not receive approval of its application for twelve weeks.[34]

ACA member Sierra Nevada Communications ("SNC") provides another example of delay by a federal government gatekeeper. SNC is seeking to provide high-speed, wireline broadband service to the 5,000 residents of Long Barn, Cold Springs and Pinecrest/Strawberry, towns in or bordering California's Stanislaus National Forest.[35] Today, these residents receive only low-speed wireless access.[36] Satellite service is unreliable due to the forest.[37] However, SNC is unable to provide high-speed broadband Internet service to the customers that have requested it without approval by the U.S. Forest Service ("UFS"), which controls access.[38] This application has been pending approval for seven years.[39] For SNC, the process has not only been long but also vexing. Application requirements have been anything but clear and UFS employees have often been unresponsive to SNC's inquiries.[40] At a meeting last December, UFS finally provided a draft permit for SNC's review.[41] However, SNC's calls to the UFS to discuss setting a meeting for execution of a formal permit have gone unreturned this year.[42]

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33 *See id.* at 3.

34 *See id.*

35 *See* Declaration of Tim Holden at 1-2, included as Exhibit 3.

36 *See id.* at 1.

37 *See id.*

38 *See id.* at 3.

39 *See id.* at 2.

40 *See id.* at 2-3.

41 *See id.* at 2.

42 *See id.*

As a small company, SNC is reliant on the UFS to provide the correct paperwork and guide it through the application process by responding to inquiries.[43] In contrast to its experience with UFS, SNC has found that its applications for rights of way and work permits are processed within a matter of days, or at most a few weeks, by the Bureau of Land Management, California Department of Transportation, and Tuolumne County Road Department.[44]

As demonstrated above, ACA members have encountered significant delays and lack of clarity in application requirements from public and private gatekeepers with respect to rights of way and similar access, sometimes resulting in effective prohibitions on providing new or competitive broadband services. As one would expect, such delays and confusion result in reduced broadband deployment.

C. ACA MEMBERS FACE EXCESSIVE FEES TO ACCESS RIGHTS OF WAY, USE FACILITIES OR CROSS RAIL LINES TO DEPLOY BROADBAND SERVICES

In the Notice, the Commission requests input regarding the reasonableness of rights of way charges.[45] ACA members have confronted excessive fees imposed by railroads, utility pole owners and the United States Corps of Engineers for access to rights of way, poles or rail crossings to deploy broadband. Many government and private entities seem to approach requests for access to facilities or crossings as opportunities for revenue-generation rather than recovery of "administrative and other specifically identifiable costs,"[46] much like many state and local governments have done.[47] For example, the City of Eugene, Oregon argues that its gross

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43 *See id.*

44 *See id.* at 3. *See also* Notice, ¶ 9 ("…we ask commenters to provide us with information on their experiences, both positive and negative, related to broadband deployment.").

45 *See* Notice, ¶ 16.

46 *Id.*

47 *See infra* Section III. for further discussion.

revenue-based fees are appropriate simply because the city is so reliant on the huge revenues that they generate for the city's budget.[48]

Such revenue generating fees increase the costs to deploy broadband, which results either in decisions not to deploy new or competitive broadband services or increased prices for consumers. According to the Commission's National Broadband Plan "only 40% of adults making less than $20,000 per year have adopted terrestrial broadband at home," which leads to the conclusion that "service [is] too expensive for some."[49] Excessive right of way and similar access fees result in higher prices for consumers, which does not promote broadband adoption nationwide.

As an example of the unnecessary fees that members reported in the ACA survey conducted, ACA member Eagle has faced arbitrary and excessive fees from both the Union Pacific and Burlington Northern Santa Fe ("BNSF") railroads when seeking to cross their rights of way. BNSF generally charges $2,500 to bore a three inch diameter hole under one of its rail lines, which is $1,000 more than Union Pacific charges for the same distance.[50] There is no difference between the two crossings that would justify such divergent rates.[51] Union Pacific, however, will not divulge the fee amount, which can vary, until after the application is approved, making budgeting difficult.[52] Further, Union Pacific charges $1,800 for protective liability

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48 *See* Comments of the City of Eugene, Oregon, WC Docket No. 11-59 (filed July 18, 2011) (stating that total fee revenues from rights of way, exclusive of the contribution of the City's municipal utility, are the fourth-largest source of City revenue.).

49 Omnibus Broadband Initiative, FCC, Connecting America: The National Broadband Plan at 23 (2010) ("National Broadband Plan").

50 *See* Declaration of Gary Shorman at 2-3.

51 *See id.*

52 *See id.* at 2. *See also* Notice, ¶ 14 (ACA does not consider such withheld charges to be "readily accessible.")

insurance for each crossing, a product for which BNSF charges $800.[53] Again, there are no differences in circumstances to justify such different rates.[54] In addition, Union Pacific requires that broadband providers collect information such as the distances from mile markers, culverts and bridges, and it charges an additional $100 to allow the broadband provider on its land to collect the data.[55]

These divergent fees for the same access and products or services from the railroad cannot possibly be based on costs or a market rate. They appear to be arbitrarily set based on the whim of the railroad with monopoly control over the crossing. Generally, Eagle cannot go around such railways and is instead at the mercy of the railroads' unchecked and excessive fees.[56]

Eagle also experiences excessive fees imposed by owners of utility poles with respect to attaching cables. When deploying broadband, attaching lines to poles is generally about half of the price of burying lines underground, so it represents an efficient means of broadband roll out. There is also less impact on the right of way surface. For example, earlier this year Eagle decided to provide competitive high-speed Internet service to a small town (Bennington, Kansas) that previously only received wireline Internet service from the phone company.[57] The engineering fees charged by Westar Energy to attach cables to its poles cost a total of $42,000, which was approximately fifty percent of the total cost to install the lines.[58]

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53 *See* Declaration of Gary Shorman at 2.

54 *See id*. at 2-3.

55 *See id*. at 3.

56 See Declaration of Gary Shorman at 3.

57 *See id*. at 4.

58 *See id*.

The fees charged by Westar Energy were $144 *per pole*.[59] Midwest Energy, on the other hand, charges $100 *per project*.[60] In the other instances where Eagle has attached its lines to poles, the pole owners have not charged fees.[61] Eagle is not aware of any differences in engineering or other circumstances that would justify such a difference in price for the same engineering work other than the fact that Westar Energy hires an engineering firm to do the work.[62]

Although Eagle decided to deploy service to Bennington, it would not likely do so again under the same circumstances because of the excessively high engineering fees.[63] Such excessive fees, that can be half of the cost of an entire project, will inevitably lead to consumers in some affected areas not being served with high-speed Internet or receiving facilities-based competitive choices, which reduces prices for broadband service. The National Broadband Plan lamented the fact that "rural areas are less likely to have access to more than one wireline broadband provider…."[64] These kinds of unchecked fees only exacerbate the problem for rural broadband competition.

Further, Eagle encountered excessive fees imposed by the U.S. Army Corps of Engineers when accessing the two mile stretch of road in Clay County discussed above.[65] The Corps permit, which took twelve months to obtain, also cost $3,650.[66] (Eagle's permit to use Clay County-controlled right of way, on the other hand, was obtained at no cost).[67] As

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59 *See id.*

60 *See id.*

61 *See* Declaration of Gary Shorman at 4.

62 *See id.*

63 *See id.*

64 National Broadband Plan at 37.

65 *See* Declaration of Gary Shorman at 3. *See also supra* at 7-8.

66 *See id.*

67 *See id.*

mentioned above, the Corps conducted no studies and engaged in no engineering work.[68] Rather, it processed paperwork and searched files for any previous environmental events in the area.[69] Eagle considers such a fee to be excessive for such activities.[70] Further, the Corps did not reveal the fee amount at the pre-application meeting or at any time until the final contract was prepared for execution.[71] Based on its knowledge of the high fees charged, however, earlier this year Eagle declined a request from another cable provider to provide capacity to Fort Riley near Junction City, Kansas because the project would have required permits from the Corps.[72]

Smaller broadband providers are subject to the same excessive fees per railroad crossing, to use utility poles or to access rights of way on federal lands as larger providers. However, they generally serve a smaller number of subscribers and cannot adequately spread such fees among their customer base like larger providers. Such fees often result in decisions not to deploy broadband service, which hinders the Commission's broadband goals. Therefore, in order to facilitate the rapid and widespread deployment of broadband service, fees should be considered unreasonable to the extent they "exceed amounts that would recover administrative or other specifically identifiable costs."[73] The Commission should initiate a rulemaking to consider imposing such an obligation.

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68 *See* Declaration of Gary Shorman at 3.

69 *See id.*

70 *See id.*

71 *See id.* at 4. *See also* Notice, ¶ 14. Again, ACA does not consider such withheld fee amounts to be "readily accessible."

72 *See id.*

73 Notice, ¶ 16.

D. MANY GATEKEEPERS EFFECTIVELY DISCRIMINATE AGAINST BROADBAND COMPETITORS

The Notice raises a concern that differing rights of way practices or charges can involve "unreasonable or discriminatory differential treatment of various types of rights of way users…."[74] ACA members have been subject to effective discrimination, with respect to rights of way and utility poles, vis-à-vis incumbent broadband providers. Eagle has been effectively discriminated against with respect to incumbent providers in Kansas by the KDOT policy of only allowing access to the outside seven feet of state highway rights of way.[75] This restriction essentially means that only a maximum of two utilities can use the rights of way, which operates to the advantage of incumbents over competitors.[76] Eagle's alternative is to obtain private easements, which are much more expensive – putting the smaller competitor at a distinct competitive disadvantage in the provision of broadband service.[77]

While the Commission is justifiably concerned about the "patchwork of requirements" that broadband providers must navigate to deploy service, including delays, excessive costs and discriminatory treatment,[78] it has not asked a key question regarding the relative impacts of such impediments on smaller companies and competitors that often provide, and seek to provide, high-speed Internet service in less-populated unserved and underserved communities. As demonstrated above, with just a few examples from ACA members, the relative impacts of such issues are palpable and of great concern.

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74 Notice, ¶ 26.

75 *See* Declaration of Gary Shorman at 4-5.

76 *See id*.

77 *See id*. at 5.

78 *See* Notice, ¶ 12.

II. THE COMMISSION SHOULD INITIATE A RULEMAKING TO ADDRESS RIGHTS OF WAY AND SIMILAR ACCESS IMPEDIMENTS TO BROADBAND DEPLOYMENT

As the Commission recognizes in the Notice, the National Broadband Plan concluded that the "cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands."[79] That concern was based on the conclusion that "the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20% of the cost of fiber optic deployment."[80] ACA has demonstrated above that the expense of obtaining pole attachments can actually amount to 50% of the cost of deployment, especially for smaller projects serving small populations that may have no broadband service or effective competition.[81]

The often unreasonable, arbitrary and revenue-generating policies of public and private gatekeepers of rights of way, facilities and railroad crossings inarguably negatively impact the deployment of broadband in this country. Such practices and policies should be further scrutinized in the context of a rulemaking proceeding at the Commission. Based on a survey of its members, ACA has provided herein a sampling of the rights of way and similar access impediments that its members face. ACA and its members, however, look forward to working with the Commission, other broadband providers, and gatekeepers in the context of a rulemaking proceeding to determine how the necessary management of rights of way and public and private property can coexist with streamlined and efficient broadband deployment in America.

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79 *See* National Broadband Plan at 109.

80 *Id*.

81 *See* Declaration of Gary Shorman at 4. *See also supra* at 11.

As a further example, when it comes to reducing the costs to deploy a fiber network, Google considers process improvements to be low hanging fruit.[82] According to Google Vice President Milo Medin, when Google began its fiber build-outs, it first asked localities to streamline application processes.[83] Therefore, addressing concerns regarding rights of way and similar access issues is of primary importance when it comes to increasing broadband deployment. Broadband deployment is a national goal, and may require national action to address the "patchwork of requirements" from public and private entities that broadband providers face to build out a network.

III. THE COMMISSION SHOULD ADOPT RULES TO CLARIFY SECTION 253 OF THE COMMUNICATIONS ACT

The Commission requested information regarding its authority to adjudicate and adopt rules regarding access to rights of way to provide telecommunications and broadband services.[84] ACA agrees with Level 3, Verizon and others that the Commission should address state and local statutes and regulations that limit the ability of potential competitors to compete in a fair and balanced legal and regulatory environment. In addition, the Commission's rules should invalidate state and local rights of way management requirements and fees that are not fair and reasonable, and competitively neutral and nondiscriminatory.

Section 253(a) of the Act provides that no state or local statute or regulation may "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[85] There is no disagreement among the parties or the

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82 *See* Brian Hammond and Lynn Stanton, *Google: Regulatory 'Process Improvement' Among Keys to Efficient Fiber Deployment*, TR Daily (Sept. 23, 2011).

83 *See id.*

84 *See* Notice, ¶ 51.

85 47 U.S.C. § 253(a).

courts regarding the appropriate standard for evaluating potential violations of Section 253(a). The Commission established in its California Payphone Order that a statute, ordinance or regulation has the effect of prohibiting an entity from providing a telecommunications service if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[86] Whether or not specifically referenced, the courts of appeals "uniformly recognize that the FCC's California Payphone Order prescribes the applicable standard for determining whether a legal requirement has the effect of prohibiting the ability to provide a telecommunications service."[87] There is, however, sufficient ambiguity regarding which state and local requirements limit the ability to compete in a fair and balanced legal and regulatory environment such that the Commission should adopt rules to clarify.

Section 253(c) permits states and localities to "manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."[88] Under at least one U.S. Court of Appeals' interpretation, state and local requirements can violate Section 253(c) without rising to the level of a violation of Section 253(a) because an unfair or unreasonable fee need not rise to the level of erecting a barrier to entry.[89] ACA contends that this is the proper interpretation, especially if advanced services, such

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86 *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, 12 FCC Rcd 14191, 14206, ¶ 31 (1997).

87 Brief for the United States as *Amicus Curiae* at 9, *Level 3 Commc'ns, LLC v. City of St. Louis*, Nos. 08-626 and 08-759 (S. Ct. May 2009).

88 47 U.S.C. § 253(c).

89 *See TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000). The same would be true of a discriminatory fee or right of access as well.

as broadband, are to be promoted.[90] Other courts have found that Section 253(c) operates to create potential exemptions once a violation of Section 253(a) has been found.[91]

In either event, a proper interpretation of the substantive terms of Section 253(c) – *i.e.*, what constitutes "fair and reasonable compensation…on a competitively neutral and nondiscriminatory basis" and "use of public rights-of-way on a nondiscriminatory basis" – is critical to considering the permissibility of local regulations regarding access to the public rights of way by telecommunications carriers. Consequently, the Commission can and should adopt rules designed to clarify which state and requirements and fees adopted for the purposes of managing the access of telecommunications providers' access to the public rights of way are fair and reasonable, and competitively neutral and nondiscriminatory.[92]

Level 3 and Verizon have identified several categories of unreasonable state and local requirements, which also have a history in Section 253 litigation, that, among others, should be proscribed when the Commission adopts rules to provide for more reasonable and efficient access to rights of way.

Fees. State and local governments have a history of imposing unreasonable charges for access to rights of way in the form of rents and gross revenue-based fees. Several

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90 *See* 47 U.S.C. § 1302(a) ("The Commission…shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans…by utilizing…measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."); *see also* 47 U.S.C. § 230(b) (It is the policy of the United States—(1) to promote the continued development of the Internet and other interactive computer services and other interactive media [and] (2) to preserve the vibrant and competitive free market that presently exists for the Internet").

91 *See e.g.*, *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004).

92 *See* 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."); *see also* 47 U.S.C. 201(b)("any…charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful…").

years ago, the City of Santa Fe, New Mexico required Qwest to pay $6,000 in annual rent to install a four-foot-by-four-foot utility cabinet on a twelve-foot-by-eighteen-foot concrete pad.[93] Multiplied out times Qwest's 365 roadside utility cabinets, the rent would have nearly quadrupled Qwest's cost of doing business in the city.[94] Level 3 and Verizon demonstrated that such unreasonable fees persist. Level 3's primary concern in this proceeding is the excessive rents imposed by the New York State Thruway Authority ("NYSTA"), that range from $78 - $34,000 per linear foot and amount to tens of thousands of dollars per year.[95] Verizon describes a similar issue with a NYSTA annual rent of $33,000 to occupy 19 feet of public rights of way.[96] Verizon also highlights recent five-fold rent increases imposed in Oklahoma and Washington for use of the public rights of way.[97]

With respect to gross revenues-based fees, in the late 1990s, the City of White Plains, New York attempted to impose a 5% gross revenues fee on TCG New York for access to rights of way, even though no compensation obligation was imposed on the incumbent.[98] Similarly, a few years later the Municipality of Guayanilla in Puerto Rico tried to impose a 5% gross revenues fee on Puerto Rico Telephone.[99] Imposition of the fee across all municipalities would have presented additional costs of $60 million annually, which was strikingly close to Puerto Rico Telephone's annual profits.[100] The municipality presented no evidence that the fee

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93 *See City of Santa Fe*, 380 F.3d at 1262.

94 *See City of Santa Fe*, 380 F.3d at 1270-71.

95 *See* Level 3 Comments at 2, 14.

96 *See* Verizon Comments at 18.

97 *See id*. at 17.

98 *See TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 79 (2d Cir. 2002).

99 *See P.R. Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006).

100 *See Municipality of Guayanilla*, 450 F.3d at 16.

was related to the actual use of the local rights of way.[101] Such gross revenues-based fees are still imposed in municipalities across the country. Verizon provides examples of existing gross revenues-based fees, which are unrelated to the amount of public right of way used or the cost for the locality to manage the access to the public rights of way by telecommunications carriers. Specifically, Verizon is subject to a 3% fee on its wireless gross revenues from the Kansas Turnpike Authority, and a 7% gross revenues fee to use any portion of the City of Eugene, Oregon's public rights of way.[102] Such excessive rents and gross revenues-based fees can hardly be considered fair and reasonable.

In-Kind Contributions. State and local governments also have a history of imposing unreasonable in-kind contribution requirements. Along with its 5% gross revenues-based fee, the City of White Plains attempted to require that TCG New York provide free conduit space for the City's use.[103] A Santa Fe ordinance required that entities seeking leases for access to rights of way install excess capacity equal to 100% of what the installer planned to use and that any conduit be given to the city.[104] According to Verizon these requirements continue, as "localities may require donations of equipment, network connectivity, services, or dark fiber."[105] Specifically, NYSTA required that Verizon donate two of eight ducts that it constructed in a right of way and the City of Portland, Oregon used Verizon's in-kind contributions to provide competing telecommunications services.[106] Such in-kind contribution requirements generally have nothing to do with management of telecommunications carriers'

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101 *See Municipality of Guayanilla*, 450 F.3d at 22.

102 *See* Verizon Comments at 18-19.

103 *See City of White Plains*, 305 F.3d at 72.

104 *See City of Santa Fe*, 380 F.3d at 1262.

105 Verizon Comments at 23.

106 *See id.*

access to and use of the public rights of way, or the impacts that carriers have on the public rights of way, but rather are thinly veiled attempts to procure free equipment.

Discriminatory Treatment. As discussed above, the City of White Plains attempted to impose a 5% gross revenues fee on TCG New York, even though no compensation obligation was imposed on the incumbent.[107] Verizon has highlighted several situations where such discriminatory treatment with respect to access to rights of way continues. Specifically, Verizon argues that in the City of Eugene, Oregon, it is subject to a higher percentage gross revenues-based fee than the incumbent local exchange carrier, and the fee is applied to a broader base of revenue.[108] Further, Verizon decided to avoid deploying broadband through Greensboro, North Carolina because Greensboro charges competitive local exchange carriers $1.75 per linear foot for access to the rights of way, but the ILEC does not pay for use of the public rights of way for its local exchange network.[109] Such differences in treatment among communications service providers skew the playing field against competitive providers and certainly cannot be considered competitively neutral and nondiscriminatory.

In addition, some discriminatory practices operate to the disadvantage of all communications services, including broadband deployment. Level 3 noted that the NYSTA rights of way fees for fiber connections are hundreds of times higher than the rates that would apply to other utilities, such as gas lines, using the same rights of way.[110] Such differences in treatment for the same rights of way make clear that states and localities are not imposing fees in order to cover the costs of managing the rights of way, but rather see an opportunity for massive

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107 *See City of White Plains*, 305 F.3d at 79.

108 *See* Verizon Comments at 21.

109 *See id*. at 22.

110 *See* Level 3 Comments at 18.

revenue generation, at the expense of customers that need broadband service or would benefit from facilities-based competition.

The persistence of the unreasonable fees and requirements described above, among others, leads to the conclusion that the Commission should adopt rules to clarify which state and local statutes and regulations materially inhibit the ability of competitors to compete in a fair and balanced legal and regulatory environment, and which fees and requirements are fair and reasonable and competitively neutral and nondiscriminatory. Without such clarification from the Commission in the form of rules setting out the limits of permissible regulations (or defining the types of regulations that would contravene Section 253(a) or 253(c)), broadband deployment will continue to be hindered by opportunistic state and local governments that see an opening to generate much-needed revenues rather than cover their costs to manage the access to and use of the rights of way by telecommunications carriers.

IV. CONCLUSION

ACA's members share the Commission's goals, as asserted in the Notice and the National Broadband Plan, to deploy broadband widely and efficiently across the nation. ACA members are working on business plans to deploy broadband every day, and must consider the multitude of restrictions, delays, excessive fees and competitively discriminatory policies imposed by various private and public entities when making decisions regarding whether to provide high-speed Internet service to a new community or compete with an incumbent provider. Such practices operate to the benefit and profit of the gatekeepers, but do not promote universal broadband deployment in America.

The Commission should initiate a rulemaking to consider these concerns further. ACA stands ready and willing to work with the Commission and other parties to address these issues.

Respectfully submitted,

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September 30, 2011

EXHIBIT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	)))))))	WC Docket No. 11-59

DECLARATION OF MARK DECKARD

1. My name is Mark Deckard and I am Director of Technical Operations for WOW!, which is a member of the American Cable Association. I submit this Declaration in support of the Reply Comments of the American Cable Association in the above-captioned proceeding.

2. WOW! is a cable television, high-speed Internet and local and long distance telephone service provider that has served customers in Illinois, Michigan, Ohio and Indiana since 1996.

3. WOW! has been seeking to expand its service to several rural areas, but, in addition to the cost per mile to serve the neighborhoods, we have to consider the extremely high costs of getting out to the communities that may be 20 to 30 miles away from WOW!'s central office. In order to reach a community, generally WOW! can attempt to attach to existing utility poles, obtain rights-of-way on private land, or, preferably, run its fiber lines along the highway. Generally, the timeframe for completing make-ready work to attach lines to utility poles involves extended timeframes and excessive costs that often jeopardize the viability of the subject project. Additionally, there is the task of negotiating and obtaining a large number of

private easements which is burdensome and can be derailed at any time by a single holdout. The cost associated with compensating landowners for private easements is another consideration that can have a negative impact on a decision to proceed with a proposed project. Typically, there are industry practices established for compensating a landowner based on local property market values. The compensation rates can vary based on the proposed use by the entity seeking the easement. Some compensation models use a flat rate, although a more common practice is to set the compensation on a "per linear foot" basis. While rates based on linear footage can vary, our experience has been a $3 to $5 per linear foot average for landowner compensation. However, landowners are not compelled to accept our compensation offer and can demand a higher compensation rate or refuse any offer extended to them.

4. When pole attachments and private easements are not technically or financially feasible, the problem with reaching new communities is primarily due to difficulties with access to rights of way along highways. For example, in order to reach the rural communities of Haubstadt and Fort Branch in Indiana with 1,900 potential customers, WOW! would need to run fiber along US Highway 41, which is a limited access divided highway. Although this highway is designated as a US highway, it is under the jurisdiction of the Indiana Department of Transportation ("INDOT") in Indiana. Pursuant to the INDOT Utility Accommodation Policy, longitudinal installations on a highway with full access control (*e.g.*, interstate highways or divided highways) are not permitted. Exceptions can be authorized by the INDOT Chief Engineer where extreme hardship is demonstrated. WOW has previously only sought an exception for existing facilities impacted by a forced relocation. The exception was granted but the process was tedious and time consuming, and took nearly a year. Based on this experience, we think it is highly unlikely that INDOT would grant an exception for a

longitudinal installation along US Highway 41 where it is designated limited access. Further, the uncertainty of gaining approval makes it difficult to secure project funding. Therefore, it is unlikely WOW! could economically serve the potential customers in Haubstadt and Fort Branch with high speed broadband.

5. In serving smaller communities, WOW! cannot spread its costs among a large customer base like providers can in large, more dense areas. Rights of way and other costs must be limited to create a viable business case when serving small numbers of customers. The only economically viable option for WOW! to serve many rural communities, such as Haubstadt and Fort Branch, with increased broadband speed, is to run lines in the rights of way parallel to highways.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Executed on 29 September, 2011

Mark A. Deckard

Mark A. Deckard

EXHIBIT 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	))))))))	WC Docket No. 11-59

DECLARATION OF GARY SHORMAN

1. My name is Gary Shorman, and I am President and CEO of Eagle Communications Inc. ("Eagle"), which is a member of the American Cable Association. I submit this Declaration in support of the Reply Comments of the American Cable Association in the above-captioned proceeding.

2. Eagle provides cable television, high-speed Internet and telephone service to 18,100 customers in Kansas and Colorado. It generally competes with other video and broadband providers.

3. Eagle has been seeking to expand its service to several communities, including in rural areas in Kansas. However, in pursuing this expansion, it has faced a myriad of impediments to deploying competitive broadband service in Kansas, including processing delays, excessive fees and onerous requirements from the railroads, the U.S. Army Corps of Engineers, utility pole owners and the Kansas Department of Transportation ("KDOT"), which controls access to highway rights of way.

4. Railroad Rights-of-Way. Eagle has been subject to arbitrary actions, including excessive fees and delays, by railroads in its attempts to cross rail lines with fiber optic

cables to provide competitive broadband services to its customers. First, although some railroads claim they will process applications for crossing within a reasonable time period, in practice the process often takes much longer. For example, Eagle filed an application with Union Pacific in 2009 to cross under a single section of rail and understood pursuant to the application materials that its application would be acted on within forty-five days. In fact, for no apparent reason, the process took three months. In addition, some railroads do not consistently apply their own rules and requirements. The requirements often change depending on the railroad representative to which you are speaking on a given day (*e.g.*, whether they require steel casing or PVC pipe for the cables). In one example, the Union Pacific application materials stated that Eagle was required to bore down twelve feet to bury cable under a rail line, but that was overturned by a railroad representative who required fifteen foot depth. Although there may not be a substantial cost to bore three feet deeper, Eagle's concern is the uncertainty and the risk that the railroad could constantly and without notice change a policy, even after the work is done. There is no appeal or obligation that the railroad follow its own requirements, so a broadband provider has no recourse to refuse or negotiate terms or conditions that it believes are unnecessary or inconsistent.

5. The fees charged by the railroads can be arbitrary and discriminatory with no apparent relation to the actual cost. Generally a Union Pacific crossing will require a $1,500 permit or "contract" fee, however, it can vary, and Union Pacific will not divulge the contract fee until after the application is approved, which makes budgeting difficult. Union Pacific also requires protective liability insurance for each crossing, which it sells for $1,800. Eagle considers this fee to be excessive because Burlington Northern Santa Fe charges $800 for the same insurance, and Eagle is not aware of any differences in circumstances that would justify the

Union Pacific fee that is more than double the Burlington Northern Santa Fe rate. Finally, Union Pacific requires that broadband providers collect information such as the distances from mile markers, culverts and bridges, however, they charge an additional $100 to allow the broadband provider on their land to collect the data.

6. Burlington Northern Santa Fe requires a $350 nonrefundable application fee. While that is not unreasonable on its face, if the railroad finds any problem with the application, they can send it back to the broadband provider and require them to re-apply, with another $350 application fee. Fees to cross a Burlington Northern Santa Fe rail line are generally $2,500 to bore a three inch diameter hole under the railway, which is $1,000 more than the Union Pacific fee. Eagle cannot see any difference between the two circumstances that would justify such divergent rates. In most cases, Eagle does not have an option to go around or avoid crossing a rail line if it wants to provide broadband service and so it is at the mercy of the unchecked fees, delays and requirements of the railroad that it needs to cross.

7. U.S. Army Corps of Engineers. In Eagle's experience, the U.S. Army Corps of Engineers charges excessive fees and imposes substantial delays to access land under its jurisdiction, which unnecessarily increases the cost to deploy broadband services. For example, Eagle held a right of way permit to run fiber optic cable along a county road in Clay County, Kansas that it obtained at no cost. Eagle was informed that two miles of road was under the jurisdiction of the Corps, and so, after a pre-application meeting, it submitted an application for access to the right of way. The permit process cost $3,650 and took approximately twelve weeks. As far as Eagle is aware, the Corps conducted no studies and engaged in no engineering work. It merely processed paperwork. One identified portion of the fee was for searching files for previous environmental events in the area, but the fee seems excessive for such tasks.

Further, Eagle was not given the fee amount at the pre-application meeting or at any time until it reviewed the final contract for execution, which, again, makes planning difficult. Based on its knowledge of the high fees charged by the Corps, earlier this year Eagle declined a request from another cable provider to provide capacity to Fort Riley near Junction City, Kansas because it would have required permits from the Corps.

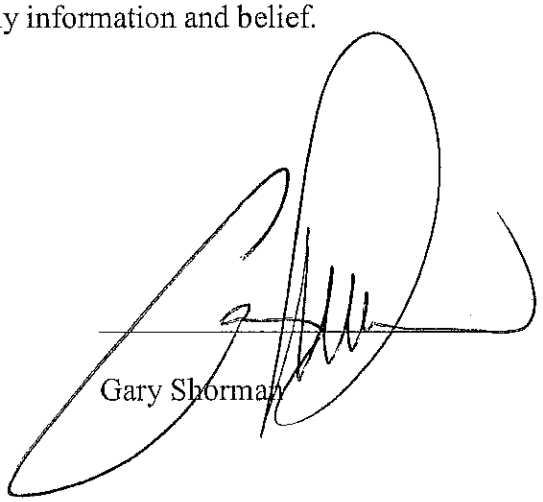
8. Utility Poles. The costs for engineering studies required by owners of utility poles often comprise a substantial portion of the cost to deploy broadband to a community. For example, earlier this year Eagle decided to provide competitive high-speed Internet service to a very small town called Bennington in Kansas that previously only received wireline Internet service from the phone company. The engineering fees charged by Westar Energy to attach cables to its poles cost a total of $42,000, which was approximately fifty percent of the total cost to install the lines. The fees charged by Westar Energy were $144 *per pole*. Midwest Energy, on the other hand, charges $100 *per project*. In the other instances where Eagle has attached its lines to poles, the pole owners have not charged fees. Eagle is not aware of any differences in engineering or other circumstances that would justify such a difference in price for the same engineering work other than the fact that Westar Energy hires an engineering firm to do the work. Although Eagle decided to deploy service to Bennington, it would not likely do so again under the same circumstances because of the excessively high engineering fees. When serving very small rural communities, as Eagle often does, such fees cannot be effectively spread over the customer base.

9. Highway Rights of Way. Certain policies of KDOT operate to advantage incumbent providers over competitors. KDOT permits users of rights of way along state highways to use only the outside seven feet of the right of way, which essentially means that

only two utility lines will be permitted. After two lines are installed, all other competitors are denied access to the right of way. In some cases of very narrow roadways KDOT will understandably not allow right of way access even to the outside seven feet for a single utility because there is not enough space to do so without impacting KDOT's ability to maintain the roadway. However, KDOT does not correspondingly allow access to more than the outer seven feet in areas where the road is wider. It appears arbitrary and not based on legitimate requirements to maintain the state highways to not allow access to even the outside seven feet of the right of way when the road is narrow, but also not allow access to more than the outside seven feet of the roadway where the road is wider. In practice, generally this means that the incumbent cable and/or broadband provider is allowed to access the right of way and competitors such as Eagle are denied, even where the highway is wide enough for additional competitor lines. The alternative for competitors like Eagle is to obtain private easements, which Eagle has been forced to do. But private easements tend to cost much more, putting Eagle at a competitive disadvantage with respect to incumbents.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Executed on 28th September, 2011



Gary Shorman

EXHIBIT 3

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	))))))))	WC Docket No. 11-59

DECLARATION OF TIM HOLDEN

1. My name is Tim Holden, and I am General Manager of Sierra Nevada Communications ("SNC"), which is a member of the American Cable Association. I submit this Declaration in support of the Reply Comments of the American Cable Association in the above-captioned proceeding.

2. SNC owns and operates five cable television systems in the Sierra Nevada foothills in rural northern and southern Tuolumne County, California. SNC currently serves Pinecrest/Strawberry, Cold Springs, Long Barn, Groveland and a portion of Columbia, California with cable television and wireless Internet. SNC is in the process of deploying high-speed cable Internet to these areas, many of which are currently unserved.

3. The communities of Long Barn, Cold Springs and Pinecrest/Strawberry are bordered and/or in Stanislaus National Forest, which is operated by the U.S. Forest Service ("UFS"). The approximately 5,000 residents of these communities currently receive only wireless Internet service. There is currently no wireline broadband provider, and satellite service is unreliable due to the surrounding trees. SNC is in the process of attempting to provide high-

speed cable broadband service to these customers but has encountered substantial permitting delays from UFS.

4. SNC provides cable television service to the residents of Long Barn, Cold Springs and Pinecrest/Strawberry and has faced constant delays imposed by the UFS. It takes two years to get a ground disturbance permit for SNC to work on its existing cable lines. Further, SNC filed an application and business plan in 2004 to expand its service to include high-speed cable broadband, which would require replacing lines to increase bandwidth. After seven years of back and forth and unreturned phone calls, SNC still has not been authorized by the UFS to provide broadband services to customers that have requested it.

5. SNC was originally given a camp ground permit application to complete, even after informing the UFS that it must be the incorrect form. Several months later SNC was able to obtain the proper forms, but with pages missing. As a small company, SNC relied on the UFS to identify the necessary application paperwork. SNC on multiple occasions, directly and through its bank, submitted forms regarding its financial status only to be told by the UFS that it did not have the forms. Eventually, in 2006, the UFS made baseless claims that SNC's financial status was not sufficient for a permit and denied its application. SNC thereafter made repeated attempts to obtain the necessary paperwork to re-apply to no avail. With respect to the delay, SNC was informed later only that the clerk whose job it was to provide and review applications had resigned and no one had been hired for three years to replace the clerk. Finally, in December, 2010, SNC had a meeting with the UFS to discuss how to move an application forward. Just before this meeting, UFS provided a draft permit document for SNC's review. SNC has reviewed the permit and attempted to set a meeting to sign a formal permit, however, SNC's phone calls to the UFS have not been returned since. It has been made clear to SNC that

Forest Service does not want SNC to provide a wireline competing broadband service to the residents that have requested it.

6. SNC is unable to provide high-speed broadband Internet service to the potential customers in Long Barn, Cold Springs and Pinecrest/Strawberry without action on its application by the UFS, which has been delayed beyond reason. In contrast, SNC has found that its applications for rights of way and work permits are processed within a matter of days, or at most a few weeks, by the Bureau of Land Management, California Department of Transportation and Tuolumne County road department.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Executed on 28 September, 2011

Tim Holden